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Supreme Court of the United States

OCTOBER TERM, 1963

No. 473

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, *Petitioners*,

v.

BEN CUTLER, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY MEMORANDUM

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Two recent opinions by District Judge Richard H. Levet,[1] who rendered the District Court opinion in the

[1] Ten copies of both of these opinions have been filed with the Clerk for the information of the Court. The very fact that the validity of the two measures upon which respondent predicates his claim of mootness is the subject of pending litigation serves further to demonstrate that the instant litigation is far from moot. Petitioners must continue to insist that the actions herein challenged are valid and that, if these other measures fail, they are free to return to those practices. "Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power." *Walling* v. *Helmerich & Payne,* 323 U.S. 37, 43; here, even the eventuality of voluntary discontinuance has been put in jeopardy by these pending suits.

instant case (Petition, App. B, pp. 7a-35a), further demonstrate that the Court of Appeals misconceived and departed from the critical factual findings of the District Court. They thus confirm the appropriateness of this Court's exercise of its supervisory powers to review and reverse the Court of Appeals' judgment. And these new expressions by the same Judge who ruled in the instant proceeding establish beyond peradventure that the legal question of the construction of § 302 (Question No. 2) is squarely presented by this case. Respondent's efforts to justify the decision below serve only to emphasize the obvious importance of that statutory question. It is to these two questions, the first procedural in nature and the second statutory, that this reply brief will be addressed.[2]

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[2] With respect to the importance and substantiality of Questions Nos. 3 and 4 we need add nothing to the Petition. Respondent asserts that he is not using the Form B Contract (Opp., p. 22). Neither court below so found and respondent did not so urge in the court below. Respondent again claims that the *Cutler* v. *United States* tax case is determinative of his "employer" status under the Taft-Hartley Act, a position which can be maintained only by disregarding the plain legislative history of the Taft-Hartley Act and the decisions cited at Pet., p. 22, which respondent plainly has misread (Opp., p. 23, para. XVIII).

Respondent's assertion regarding his activities in interstate commerce (Opp., p. 4) are likewise unsupported by any factual findings. Since the District Court made painstaking findings in this as well as other issues, it is fair to assume that the evidence did not justify respondent's claim. Respondent did not contend in the Court of Appeals that the District Court's findings were inaccurate or inadequate. The lengthy opposition nowhere disputes that the Court of Appeals' unprecedented expansion of the commerce power, as properly presented in the Petition, requires this Court's attention.

I

In the first of the two cases in which these opinions issued, *Schwartz, et al.* v. *Associated Musicians of Greater New York, Local 802, and the American Federation of Musicians,* No. 63 Civ. 2442, S.D.N.Y., the plaintiffs asserted that Local 802's new 1½% local tax, adopted in light of the judgment rendered in the instant case, was violative of § 302 of the Labor-Management Relations Act even though the tax is to be collected directly from the members themselves. On October 30, 1963, Judge Levet issued an opinion and judgment granting summary judgment against the plaintiffs. The portions of that opinion which indicate the gross error of the Court of Appeals in the instant case read as follows:

> All of the challenges center about whether the Local taxes are membership dues and thus an obligation of the sidemen or whether they are solely the obligation of the leader. As the chronology of the tax shows, from October, 1943 to October, 1955 the resolutions made it clear that the tax was 'to be payable by and collected from all members.' The standing resolution which became effective January 1, 1961 repeated the language that the Local tax was 'payable by and collected from all members,' but went on to provide that the '[l]eaders shall be held responsible for the collection and payment of this Tax.' Although the wording in the light of present events is perhaps somewhat inartistic, it would appear that *the Local tax is, and has been since October, 1943, an obligation of the membership. The Local, for reasons best known to itself, chose in 1961 to make the orchestra leader its agent for collection. Yet, the obligation, while perhaps initially the leader's for ease of collection, remained ultimately that of the sideman.* [Emphasis added.]
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> * * *

> The major thrust of the plaintiffs' argument is that the resolution of September 26, 1960 made the Local tax the obligation of the leader and the present methods of direct collection of the tax from members beginning in December, 1962 transformed that obligation to the membership without the statutory prerequisites. Again, resort mu[st] be had to the history of the tax to determine whose obligation it was on September 14, 1959, the effective date of Section 101(a)(3), 29 USC § 411(a)(3).
>
> In 1959, the standing resolutions did not mention the leader and read simply that the tax shall be 'payable by and collected from all members.' *This language would dispel any contention that the obligation was upon any one other than the members.* The introduction, effective January 1, 1961, that 'The leader shall be held responsible for the collection and payment' of the tax did not change the nature of the obligation. The change can best be described in legal parlance as making the leader the agent for collection and, in effect, secondarily liable, while leaving the primary liability with the membership. Since the nature of the obligation did not change, there was no violation of Section 101(a)(3) when the union sought to collect the tax directly from the members by either direct billing or check-off authorizations. [Emphasis added.]

Likewise, on October 28, 1963, Judge Levet issued an opinion in the related case denominated *Wittstein, et al.* v. *American Federation of Musicians*, No. 63 Civ. 2548, S.D.N.Y., in which the respondent Cutler is a named plaintiff. Judge Levet there held that the Federation's convention procedure in adopting an increase in the per capita dues of Federation members, an increase designed to replace the traveling surcharge

tax outlawed in the instant case, violated the Labor-Management Reporting and Disclosure Act of 1959. 29 U.S.C. § 411(a)(3)(B)(i). In the course of that opinion, which is the subject of an appeal pending before the Court of Appeals for the Second Circuit, Judge Levet made the following comments pertinent to the instant case:

> In order to place the action of the convention in its proper reference, it is necessary to briefly review the legal history of the Federation's 10% traveling surcharge. *Article 15 of the Federation's By-laws requires that Federation members who perform a 'miscellaneous out-of-town engagement' be paid, but not to actually receive, an amount equal to 10% of the minimum wage established by the local in whose jurisdiction the engagement takes place.* This additional amount is known as the 'traveling surcharge.' The orchestra leader does not actually turn over the additional 10% to his musicians (sidemen) because Federation By-laws provide that the local in whose jurisdiction such engagement is performed must collect the travelling surcharge from the orchestra leader and transmit the amount to the Federation. Should the Local fail to collect the surcharge from the leader, the leader is required to transmit the surcharge directly to the Federation. [Emphasis added.]

Thus in both the *Schwartz* and *Wittstein* cases, Judge Levet iterates and reiterates what is the basic and uncontestable fact in this case—that the work taxes here in issue are *a membership obligation of the sidemen* and that the leader does nothing more than act as the union's agent for collection. To say, as the Court of Appeals said, that this obligation is payable out of the pocket of the leader is to ignore the

plain and uncontested findings of Judge Levet in the instant case (see Petition, pp. 12-13) and to transform the whole nature of the legal question properly presented by the true facts for review.

Moreover, in *Carroll* v. *Associated Musicians of Greater New York*, 316 F. 2d 574 (C.A. 2), rendered the same day as the decision in the instant case, the Court of Appeals itself recognized that the transmittal of the moneys here involved was solely an obligation of union membership. There the Court of Appeals affirmed the District Court's ruling that two orchestra leaders who had previously performed the same functions as the respondent Cutler "had no standing to challenge the union exactions because they are no longer members of the union and the exactions are required only of members." 316 F. 2d at 575.

Even the respondent now in effect concedes the critical factual error of the Court of Appeals. This concession is clear despite respondent's confusion (Opp., p. 22) as to whether this error was one of fact or law and despite his belated effort (Opp., p. 22) to assert for the first time that, if the facts be as the District Court found them to be, the findings were "not basic" and were clearly erroneous. The important point is that respondent himself repeatedly underlines the factual misapprehension of the Court of Appeals by admitting that Cutler actually "deducted the amount of the 'local taxes'. . . from the wages he paid to sidemen" (Opp., p. 7), and by asserting (Opp., pp. 12, 13, 14, 19, 23) that the petitioning unions should have obtained check-off authorizations from the sidemen *for the deductions from their wages*.

The error of the Court of Appeals is too plain and too fundamental to be cast aside as involving no more

than a factual complaint by a disappointed litigant. The error goes to the very integrity of the appellate process, a process which is designed to give all litigants their day in court and an opportunity to secure review of lower court judgments on the basis of the facts and issues there developed. This Court has emphasized time and again the impropriety of an appellate resolution of a case "on a new issue as to which the opposite party had no opportunity to present a defense before the trial court." *Fountain* v. *Filson*, 336 U.S. 681, 683; see also *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571; *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212. The flagrant abuse of the appellate power in this case calls for the exercise of the supervisory powers of this Court. See *Letulle* v. *Scofield*, 308 U.S. 415, 416; *Aratani* v. *Kennedy*, No. 324, Oct. Term, 1963, certiorari granted, October 21, 1963 (see Question No. 1 in Petition).

II

Once this Court exercises its power to remove the factual misconception of the Court of Appeals, there emerges the underlying question whether § 302 makes it a crime for a union to collect money from employer-members on an equal footing with moneys collected from all other members. The respondent's Brief in Opposition serves to emphasize the critical importance of this § 302 issue.

In scoffing (Opp., pp. 24, 25) at the view that § 302 prohibits payments only when an employer is acting as an employer, not when he acts as does any other union member, respondent poses what has been from the beginning the central issue of this litigation. Unless the term "employer" in § 302 is limited to its intended

context—to denote an individual while acting as an economic adversary of the union rather than extended to the individual dealing with his own union in the course of the normal member-union relationship—§ 302 is recast into a blanket prohibition of the payment to unions of employer-members' dues and other financial membership obligations. Respondent contends (Opp., p. 23) that "it simply does not matter 'that the transmittal is performed solely as a union obligation.'" But if such an expansion of § 302 be accepted, as the courts below accepted it, the time-honored practice of many unions in accepting dues from employer-members becomes criminal.[3]

This problem of statutory interpretation is indeed one of national scope, affecting innumerable union practices apart from those of petitioners. And the fact (see Opp., p. 15) that these unions have not significantly suffered since the adoption of § 302 in 1947 only emphasizes the novelty of the ruling below; up until now no court has even intimated that § 302 should be interpreted or applied so as to affect these legitimate union interests.

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[3] In *Labor Board* v. *Hearst Publications*, 322 U.S. 111, 127, n. 26, this Court expressly recognized "The practice of self-organization and collective bargaining to resolve labor disputes has for some time been common among such varied types of 'independent contractors' as musicians . . . and such atypical 'employees' as insurance agents, artists, architects and engineers."

The International Typographical Union, the oldest national labor organization in the United States, is one of the many unions accepting employers as members and accepting dues from them. "In many small print shops the owner himself is a union member, and in the smallest shops he may even work at the trade in the old craft tradition of the master surrounded by his journeymen." Lipset, Trow and Coleman, *Union Democracy* 152 (1956).

Respondent recognizes that implicit in his assault upon the unions' right to impose financial membership obligations on employer-members is a challenge to the legality of their membership itself. He justifies the decision below by asserting (Opp., p. 17) that "petitioners have no legitimate interest in having members like Cutler, whose very union membership constitutes a combination in violation of antitrust." But this assertion springs from a misreading of the decision in *Los Angeles Meat Drivers' Union v. United States*, 371 U.S. 94, and its express recognition that unions "often have a legitimate interest in soliciting self-employed entrepreneurs as members."[1] But the mere fact that respondent is driven to this position underscores the national significance of the question presented. The interpretation of § 302 rendered in the courts below, and repeated here by respondent, strikes at the vitals of union membership policies. For if it is a crime for an employer member to pay dues or other monetary obligations to his union, then § 302 indeed outlaws, as respondent asserts, any "legitimate interest

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[1] Respondent mistakenly relies on the fact that the grease peddlers in the *Los Angeles Meat Drivers' Union* case were self-employed and did not hire other drivers. The controlling factor, however, was the absence "of any actual or potential wage or job competition, or of any other economic interrelationships, between the grease peddlers and the other members of the union" (371 U.S. at 98)—thereby justifying a decree divesting the grease peddlers of the union membership in the circumstances of the case. But in the instant case respondent Cutler concededly performs on an instrument, Opp., pp. 4, 16, and competes for engagements with other union members; indeed, conducting is itself a musical function. Thus the petitioning unions have a legitimate interest in having such persons as Cutler as a member. The question squarely presented is whether an employer, who is legitimately a union member, commits a crime when he pays dues or other financial membership obligations to the union.

[of a union] in soliciting self-employed entrepreneurs as members." *Ibid.*

While the importance of the question of statutory construction is thus emphasized by what is said in the Opposition, its substantiality is emphasized by what the Opposition leaves unsaid. Neither the Opposition nor any opinion below explains how the prohibition of these union practices furthers the object of § 302 as authoritatively expounded in the *Arroyo* and *Sinclair* cases or how that construction can be squared with §§ 8(b)(1)(A) or 8(b)(4)(A) of the Act. If the Taft-Hartley Act is read as a totality, as this Court's decisions require, it is entirely inconceivable that the same Congress which made it *only an unfair labor practice* for a union to coerce an employer into membership made it a *crime* for the union to accept dues from such employers when they joined voluntarily.

Respondent says (Opp., pp. 24-25) that the challenged construction of § 302 raises no constitutional problems. In our view the constitutional doubts are not only substantial—they are unanswerable. In the very case in which the Labor-Management Relations Act was first held to be constitutional, Mr. Chief Justice Hughes declared it to be a "fundamental right" for employees "to organize and select their representatives for lawful purposes." *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33. Since this freedom of association is guaranteed by the First Amendment, the right of respondent's members to join with other musicians, though they be employers working at the trade, for lawful purposes is constitutionally protected. An interpretation of § 302 which would make it unlawful for some members to share the common expense of all would infringe on the members' right

to determine the form of the association without promoting any public purpose. Any limitation on association may be sustained "only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock*, 361 U.S. 516, 524. The decision below raises a question involving every trade union which admits into membership employers working at the trade.

For these reasons, and those stated in the Petition, the writ of certiorari should issue.

Respectfully submitted,

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